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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

NO. 73-6132

RUBEN RAMOS and LEANDRO CARDE,
Petitioners,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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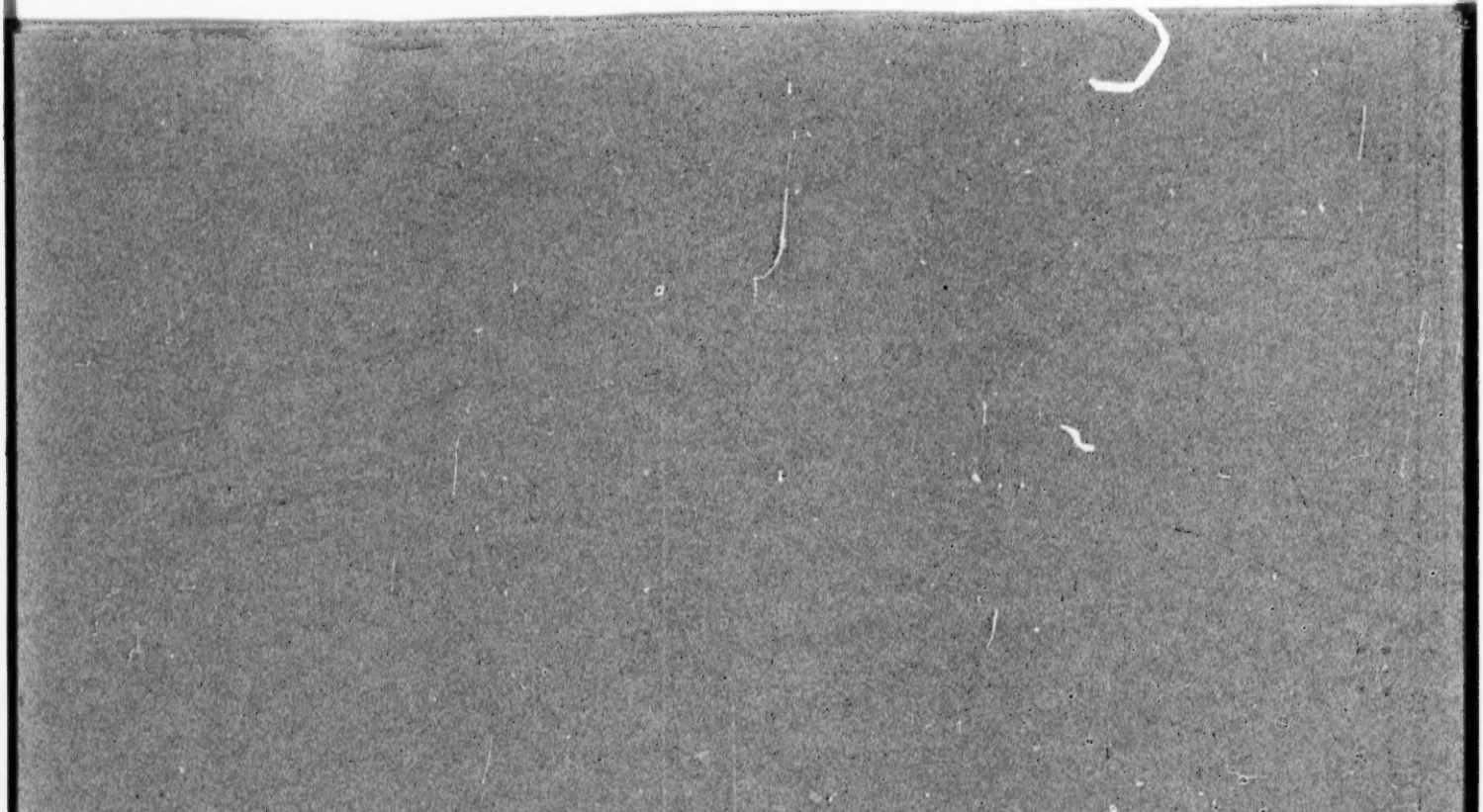

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a Writ of Certiorari to review the judgment of the Appellate Department of the Superior Court of the State of California, County of Los Angeles, entered against Petitioner in the

matter of People v. Ruben Ramos, et al., Superior Court No. CR A 12175, Municipal Court No. 31425576, order denying rehearing and denying certification filed October 31, 1973 be denied. In the alternative, Respondent prays should the writ herein issue, that the within matter be consolidated with Respondent's forthcoming petition for writ of certiorari in the matter of People v. Welton, Superior Court No. CR A 12083, Municipal Court No. 794872, memorandum opinion filed December 5, 1973, order denying rehearing and denying certification filed December 20, 1973. The identical issue presented herein [constitutionality vel non of Los Angeles Municipal Code §42.00(e)] is presented in Welton, supra [constitutionality vel non of Los Angeles Municipal Code §42.00(d)]. The lower court herein held the statute a correct municipal police power regulation of commercial sales activities along public thoroughfares. Implicitly the statute herein was held to be entirely constitutional, abridging none of the protected rights of due process, equal protection, free speech or free press. The same statute [the differences between

42.00(e) and 42.00(d) are not substantial] was held by the same court in Welton, supra, to be unconstitutional on its face in direct abridgment of the right of free speech as guaranteed by the federal First Amendment.

OPINIONS BELOW

No oral or written opinions were issued by the reviewing court.

JURISDICTION

This Honorable Court has clearly established that it should not take jurisdiction to review a judgment where no opinion was delivered by the highest court of a state.

The Appellate Department of the Superior Court of Los Angeles County delivered no opinion in this case. Said Appellate Court, therefore, did not directly pass upon any federal questions. As held by Stembridge v. Georgia (1951) 343 U.S. 541, 547, 96 L. Ed. 1130, 72 S.Ct. 834:

> "Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal

ground, this Court will not take jurisdiction to review the judgment [citations]." (Emphasis original.)

Respondent would note that Petitioner's allegation that the statute is an "unreasonable and arbitrary restriction of an individual's right to earn a living" on public streets and sidewalks [Petition, 5: 27-28] is an issue which easily could have been based upon an independent state ground. The California Supreme Court has clearly held:

> "A long line of decisions has established the rule that commercial messages do not come within the orbit of the First Amendment and may be regulated or prohibited by the government in the same manner as other business affairs. (See Freedom of Expression in a Commercial Context, 78 Harv.L.Rev. 1191.) Thus, although a city may not prohibit public distribution of handbills expressing protected ideas (Schneider v. State [Town of

Irvington] (1939) 308 U.S. 147, 162 [84 L.Ed. 155, 165, 60 S.Ct. 146]) it may ban commercial advertising in the form of handbills (Valentine v. Chrestensen (1942) 316 U.S. 52, 54 [86 L.Ed. 1262, 1265, 62 S.Ct. 920]). A distributor of notices for a religious meeting may not be barred from soliciting homeowners by an ordinance against the ringing of doorbells to distribute advertisements (Martin v. City of Struthers (1943) 319 U.S. 141, 146-149 [87 L.Ed. 1313, 1318-1320, 63 S.Ct. 862, 882]), but door-to-door solicitation for the sale of magazine subscriptions may be banned (Beard v. City of Alexandria, La. (1951) 341 U.S. 622, 641-645 [95 L.Ed. 1233, 1247-1249, 71 S.Ct. 920, 35 A.L.R.2d 335]). In the case at bar, the policy of the district reverses these acceptable priorities and perversely gives preference to commercial advertising

over nonmercantile messages."
(Emphasis added.)

Wirta v.Alameda-Contra Costa Transit District (1967) 68 Cal.2d 51, 57, 64 Cal.Rptr. 430, 434 P.2d 982.

QUESTION PRESENTED

Does the federal First Amendment (free speech), the Fourteenth Amendment (due process), or the California Constitution, Article I, section 13 (due process) protect oral solicitations for the commercial sale of goods, wares, and merchandise to pedestrians on a public sidewalk in the Civic Center in violation of a municipal ordinance which restricts the manner of sales of goods, wares, and merchandise to property which is not located along public thoroughfares, where the sole intent of the sale is personal economic profit, not the dissemination of information, ideas, opinions, views, or beliefs?

STATEMENT OF THE CASE

Petitioners, Ruben Ramos and Leandro Carde, were arrested October 20, 1972 after each had approached different pedestrians walking upon the sidewalk in the Civic Center area of downtown Los Angeles. After accosting the pedestrians to stop, each petitioner separately, orally solicited the sale of merchandise. In that conjunction each petitioner filled out a small, white, appointment card for the purpose of showing the "boss" that the sales appointment had been made. Petitioner Carde's appointment was for the sale of "cookware, stereos, whatever you want to buy." Petitioner Ramos' appointment was for the sale of cookware.

Petitioners were charged with violating Los Angeles Municipal Code §42.00(e)(1) which reads in toto as follows:

> "(1) Except as otherwise provided in subsection (j) of this section, it shall be unlawful for any person in or on any street, sidewalk, or other public way to:

(A) Importune or solicit the purchase of any goods, wares of merchandise or the employment of any services or facilities;

(B) Cry, solicit or proclaim the availability of any goods, wares or merchandise, or of any services or facilities;

(C) Cry, solicit for or proclaim any show, exhibition, entertainment tour, excursion, sight-seeing trip, real estate, or oil well viewing or inpsection trip; or

(D) Make any statement or gesture for the purpose of commanding, announcing, advertising, or calling attention to any of the foregoing."

The subsection (j) exemption relates to the sale of newspapers and newsperiodicals which are not sold for the primary purpose of commercial gain and are obviously protected by the federal First Amendment.

Petitioners were charged with violating subsection (A) of the foregoing L.A.M.C. 42.00(e)(1), supra.

On October 26, 1972 Petitioners were duly arraigned in Division 80, Los Angeles Municipal Court. Not guilty pleas were entered; trial was set for November 16, 1972.

The docket does not reflect what happened on November 16, 1972 but evidently the not guilty pleas were withdrawn in order to allow Petitioners to demur to the misdemeanor complaint.

On December 8, 1972, Petitioners filed written motions to set aside the (not guilty) pleas and demurred to the complairt. The basis for the demurrer was allegedly that the statute was unconstitutional on its face by violating due process and equal protection in abridging the right to conduct lawful business on public streets and sidewalks.

On December 22, 1974 before the Honorable Wilbur G.Dettmar, Judge Presiding, the motion to withdraw pleas was granted; the demurrer was heard, argued, and denied.

Trial was reset for January 11, 1973, which was later continued to February 5, 1973.

On February 5, 1973, Petitioners decided to submit the matter for trial on the basis of the written arrest report alone. Each Petitioner and his counsel stipulated to that effect. Full waivers of the rights to jury trial, cross-examination, confrontation, and self-incrimination were taken, and the matter was so submitted. The Honorable Glenn A. Wymore, Judge Presiding, then read and considered the written arrest report. Both Petitioners were found guilty. Thereafter each Petitioner was fined thirty-five dollars ($35).

ARGUMENT

I

THE COURT BELOW WAS CORRECT IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT BECAUSE THE STATUTE IS A PROPER ENACTMENT TO REGULATE BUSINESS ACTIVITIES OCCURRING IN THE CITY OF LOS ANGELES

The instant petition presents no substantial federal question. The intent and purpose of Los Angeles Municipal Code

§42.00(e) is obvious. It is a business regulation restricting the manner of sales/employment activities in the City of Los Angeles. The statute is purely economic in impact; it is expressly limited to regulating "the purchase of any goods, wares or merchandise" or the "employment of any services or facilities." Its effect along with a multitude of additional Los Angeles Municipal Code business and licensing regulation is to insure that public safety along municipal thoroughfares is not impeded nor impaired by commercial activity. This responsibility for public safety extends not only to vehicular avenues but also to pedestrian sidewalks and adjacent parkways.

The statute in no way affects a person's ability to earn a living anywhere on <u>private property</u> nor anywhere on public property which is <u>not</u> adjacent to public thoroughfares ("in or on any street, sidewalk, or other public way . . ."). Public safety is clearly a rational basis for enacting such municipal police power regulation.

> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open

and available for movement of people and property, the primary purpose to which streets are dedicated."

Schneider v. State (1939) 308 U.S. 147, 160, 84 L.Ed. 155, 60 S.Ct. 146;

Pittsford v. City of Los Angeles (1942) 50 Cal.App.2d 25, 28, 122 P.2d 535.

Business activity is itself a rational basis for enacting such economic regulation.

"The possibly desirable objectives furthered by advertising would not seem to require its protection by the First Amendment, particularly since the primary purpose of commercial advertising is to advance the economic welfare of business enterprises, over which state and federal governments enjoy wide powers of regulation." (Emphasis added.)

NOTE: "Freedom of Expression in a Commercial Context," 78 Harv.L.Rev. 1191, 1195 (1965);

Resnik, "Freedom of Speech and Commercial Solicitation," 30 Calif.L.Rev. 655, 657 (1942);

Wirta v. Alameda-Contra Transit District, supra;

Pittsford v. City of Los Angeles, supra.

Los Angeles Municipal Code §42.00(e) is a proper commercial regulation of business activities along public streets and sidewalks.

II

THE LOWER COURTS ACTED CORRECTLY IN (IMPLICITLY) CONSTRUING LOS ANGELES MUNICIPAL CODE §42.00(e) SO AS TO AVOID UNCONSTITUTIONAL INTERPRETATION

"So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed [citations]; and it is to be presumed that state laws will be construed in that way by the state courts."

Fox v. Washington (1915)
236 U.S. 273, 277, 59 L.Ed. 573, 575, 35 S.Ct. 383.

". . . [W]e take for granted that the ordinance will be so read to avoid raising difficult constitutional problems which any other application would present."

Garner v. Board of Pub. Works of Los Angeles (1951)
341 U.S. 716, 724, 95 L.Ed. 1317, 1325, 71 S.Ct. 909.

These United States Supreme Court mandates are followed by the California Supreme Court:

"We must, however, presume that the legislature intended to enact a valid statute: we must, in applying the provision, adopt an interpretation that, consistent with the stautory language and purpose eliminates doubts as to the provision's constitutionality [citations].' (Emphasis added.)

In re Kay (1970) 1 Cal.3d 930, 942, 83 Cal.Rptr. 686, 464 P.2d 142.

"Although a broad construction would infest section 626.4 [of the Penal Code] with many of the asserted constitutional infirmities, we believe that a narrower interpretation will both effectuate the legislative purpose of the statute and confine it within constitutional parameters."

Braxton v. Municipal Court (October, 1973) 10 Cal.3d 138, 144, 109 Cal.Rptr. 897, 514 P.2d 697.

This is done despite (or because of) the fact that a literal reading might appear too broad:

"We point out, however, that the statute, if literally applied, would succumb to constitutional attack both because of First Amendment overbreadth and vagueness."

Braxton, supra, at 144.

The lower court was correct in construing Los Angeles Municipal Code §42.00(e)

within its obviously commercial purpose. It is undisputed that Petitioners were engaged in commercial activity on public sidewalks (in the Los Angeles Civic Center, in fact). Very little is left to construe: the statute was simply (and correctly) applied to Petitioners' conduct. In so doing the lower court and trial court followed exactly the very purpose of the enactment.

> ". . .[W]e follow the well-settled principle that if 'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution [citations]."
>
> Braxton v. Municipal Court, supra, at 145.

III

COOKWARE AND STEREO SETS ARE CLEARLY "GOODS, WARES AND MERCHANDISE" WITHIN THE STATUTE WHICH PROHIBITS THE SALE AND SOLICITATIONS FOR SALE OF GOODS, WARES, AND MERCHANDISE UPON PUBLIC STREETS AND SIDEWALKS

The statement is so obvious as to make argumentation unnecessary.

IV

LOS ANGELES MUNICIPAL CODE §42.00(e) IS A PROPER COMMERCIAL REGULATION AND AS SUCH DOES NOT INVOLVE SUBSTANTIVE FIRST AMENDMENT INTERESTS

". . . [C]ommunications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression."

Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 105, n.46;

Redish, "The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression," 39 Geo.Wash L.Rev. 429, 430 (1971).

It is clear that commercialism, i.e., the profit motive, removes First Amendment protection from what would otherwise be protected speech. The leading case is the unanimous opinion of Valentine v. Chrestensen (1941) 316 U.S. 52, 54, 86 L.Ed. 1262, 62 S.Ct. 920:

> "This court has unequivocally held that the streets are proper places for the exercise of freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be judged a derogation of the public right of user,

> are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct." (Emphasis added.)

Defendant therein had argued that the purpose of the handbills was to disseminate public information. If that were true, the activity would have been protected by the First Amendment. In point of fact, it became apparent that Mr. Chrestensen's motive was pecuniary gain, not public information. The court was not gullible.

"The respondent contends that, in truth, he was engaged in the dissemination of matter proper for public information nonetheless so because there was inextricably attached to the medium of such dissemination commercial advertising matter. The court below appears to have taken this view since it adverts to the difficulty of apportioning, in a given case, the contents of the communication as between what is of public interest and what is for private profit. We need not indulge nice appraisal based upon subtle distinctions in the present instance nor assume possible cases not now presented. It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every

> merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." (Emphasis added.)
>
> Valentine v. Chrestensen, supra, at 55-56.

Classifying defendant as a "merchant" resolved the entire matter. So likewise did classifying his item as an "advertising circular." As respondent demonstrated in his "Supplemental Points and Authorities . . ." (in the court below), the test for determining whether or not a person's activity is "commercial" (and not protected by the First Amendment) or "noncommercial" (and protected by the First Amendment) is the motive (or dominant motive) for the activity. For an astute articulation of factors to be used in that evaluation, see Judge Frank's dissent in Chrestensen v. Valentine, 122 F.2d 511 (2nd Cir. 1941).

The entire problem of Jehovah's witnesses activity, with its repeated United States Supreme Court consideration is

likewise resolved by dominant motive analysis. The dominant motive of religious (political, social, aesthetic, economic) information disseminators is to inform the public. Their function is educational. That is why Alexander Meiklejohn considered them so important for democratic processes and clothed them with First Amendment protection. [cf. Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Har.L.Rev. 1 (1965).] These are disseminators; they intend disseminating, spreading, giving away. They intend contacting large numbers of people, not for what they can receive from them, but rather for what they give (usually in the form of views, ideas, beliefs, protests, complaints--socially significant information). That they may receive a pecuniary pittance (donation) to help alleviate the economic cost of delivering their message (usually in the form of literature--handbills, pamphlets, leaflets, etc.) is merely incidental to their dominant purpose.

> "But it is because we view these sales as partaking more of commercial than religious or

educational transactions that we find the ordinances, as here presented valid." (Emphasis added.)

Jones v. Opelika (1942)
316 U.S. 584, 598, 86 L.Ed. 1691, 62 S.Ct. 1231, 141 A.L.R. 514.

Upon rehearing the Court had a change of view:

". . . [T]he mere fact that the religious literature is 'sold' [note the italics] by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."

Murdock v. Pennsylvania (1942)
319 U.S. 105, 111, 87 L.Ed. 1292, 63 S.Ct. 870, 146 A.L.R. 81.

The Court was subconsciously applying dominant motive analysis. Once correctly characterized as "missionary evangelism," the incidental receipt of small amounts of cash did not remove the characterization.

The purpose of Petitioners' activity herein was clearly commercial. They were employed to solicit the sales of stereo

sets and cookware and "whatever you want to buy." That clearly commercial purpose removes First Amendment protection. The dominant purpose of the magazine solicitors in Breard v. Alexandria (1951) 341 U.S. 622, 95 L.Ed. 1233, 71 S.Ct. 920, 35 A.L.R.2d 335 was clearly financial gain. They were correctly found to be beyond the protection of the First Amendment.

In Kim Young v. California, a companion case to Schneider v. State, supra, this Court correctly struck down Los Angeles' original handbill ordinance because the statute failed to draw the commercial/non-commercial distinction, i.e., failed to restrict itself to purely commercial activity. Thereafter the revised ordinance (Los Angeles Municipal Code §28.01.1) expressly made the distinction, limiting its application solely to commercial handbills.

In a brilliant analysis of the non-relation of First Amendment protection and commercial solicitation, the California Court of Appeal articulated the following:

> "It may be seen then that there is a real basis for distinction

between the exercise of such constitutional rights when in connection with ordinary business activities and the exercise of those same rights when in relation to public expressions of opinion upon political, religious, social and economic questions in so far as regulation and control thereof under the police power is concerned. As far as general expressions of opinion are concerned, public places frequently afford the only forum where free speech may be exercised. Under such circumstances, prohibition of use of the streets for this purpose at once constitutes an abridgment of the right of free speech and a violation of its constitutional guaranty. On the other hand, prohibition of the use of public places for purposes of commercial advertising, assuming without deciding that such advertising embodies principles of free speech and a free press, may not

so readily be said to abridge constitutional rights in this respect. Other channels of expression of equal value may still be left open to the commercial advertiser. Consequently, what would constitute actual prohibition of expressions of opinion when applied to the public at large might only serve as a reasonable regulation when applied to matters of commercial advertising. The place for the conduct of a private business is upon private property; and it has been said that there is no vested right to do business upon the public streets, '. . . the highways of the state are public property. They are established and maintained at public expense for the use of the whole people, primarily as avenues of communication for their private uses, and their use for private gain is "special and extraordinary." Having that consideration in mind, it is not only within the power of the state, but its imperative duty

to so regulate their use for private gain, that it may not materially impair or destroy their usefulness as avenues of communication adequate and available for the use of all citizens for their own proper and private purposes.' [Citations.]"

". . . [I]t may well be said that the public at large has a vested right to the exercise of these constitutional freedoms in public places; but there is sufficient basis, both in logic and in reality, for declining to extend such a doctrine to the protection of purely private commercial activities conducted upon public property. 'Nor is it an objection to the validity of such an ordinance regulating the use of the streets, that the acts prohibited would not in and of themselves necessarily obstruct travel, or in any way create a nuisance. The carrying on of trade or business in the public streets by one,

or by a few persons, might not be of sufficient consequence to materially obstruct the public travel, while, if the same thing would be done by many, it might create a serious obstruction and nuisance, and what may be done by one in this respect, all must have an equal right to do.' [Citations.] Though a regulation of business conducted upon the public streets may adversely affect certain individuals whose commercial welfare is peculiarly dependent upon such usage, this circumstance affords no argument against the validity of an ordinance otherwise bearing a reasonable relation to the public health, safety and general welfare, if the ordinance in question adopts a sound method of classification." (Emphasis added.)

Pittsford v. City of Los Angeles
(1942) 50 Cal.App.2d 25, 32-33, 122 P.2d 535.

Continuing,

> "However the situation may be viewed, the effect of the ordinance is to regulate business conducted on the streets. As far as respondents' business is concerned respondents are permitted to take pictures upon the streets but are not permitted to distribute literature, applications or order blanks in connection therewith. The distribution of order blanks and cards in the case at bar must necessarily be view as an incident to the enjoyment of an interest in property, the property being the 'candid camera' business. In the final analysis the problem here presented should be approached from that standpoint rather than from any consideration of the principles of freedom of speech and of the press, which, as already pointed out, are not material to the question, nor particularly relevant. It is to be noted that in all the cases, cited by the

parties herein or found upon review of the question, which concern the validity of a handbill ordinance as applied to a strictly commercial activity, the courts have considered the question in the light of a regulation or prohibition of a property right rather than that of freedom of speech or press." (Emphasis added.)

Pittsford, supra, at 35.

Repeating the foresight of Valentine, supra:

"The question is not whether the legislative body may interfere with the harmless pursuit of lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of . . . the public use to which streets are dedicated." (Emphasis added.)

Valentine v. Chrestensen, supra, at 54-55.

This Court has unequivocally held that municipalities are not forced by any

constitutional cogency to allow commercial activities along public streets and sidewalks. On the contrary, it has been held that such activities: ". . . do not come within the orbit of the First Amendment and may be regulated or prohibited by the Government in the same manner as other business affairs." (Emphasis added.) Wirta, supra, at 57.

When Petitioners state that citizens have a constitutional right to disseminate information regarding the availability of goods for sale (Petition 7: 27-30), they are obviously confusing the commercial/noncommercial distinction for First Amendment adjudication.

V

LOS ANGELES MUNICIPAL CODE §42.00(e) DOES NOT VIOLATE FEDERAL OR STATE DUE PROCESS

Petitioners allege that the statute is ambiguous in that it fails to give notice of what conduct is criminal. (Petition 7:31-8:1). Not so. The statute clearly makes it a violation to 1) be upon a public sidewalk/street in municipal Los Angeles,

and 2) then and there importune or solicit pedestrians or motorists for commercial purposes. What is unclear about that?

Whether the solicitor is soliciting for commercial as opposed to noncommercial purposes is clearly within the solicitor's own determination. The solicitor knows whether his intent is primarily commercial, i.e., financial gain, or some other noncommercial purpose. Likewise, law enforcement can tell if the solicitations are commercial or not. Judge Frank, in his brilliant treatment of "dominant motive" analysis to determine commercial purpose (and hence nonapplicability of the First Amendment) allows the clear use of extrinsic evidence by police officers:

> "Whatever may be the means employed by city officials to determine whether a handbill [or oral solicitation] is commercial, the courts are open to the citizen who believes that the city's official's decision is incorrect."
>
> Dissenting opinion, Chrestensen v. Valentine (1941) 122 F.2d 511, 522 (2nd Cir.) N.B. that Judge Frank's

dissent in effect "becomes" the majority opinion upon reversal by the Supreme Court in Valentine v. Chrestensen, supra.

VI

LOS ANGELES MUNICIPAL CODE §42.00(e) DOES NOT VIOLATE EQUAL PROTECTION OF THE LAW

"I can find neither reason nor authority [to extend free speech protection] to commercial advertisements simply because the word 'speech', taken alone, includes both social and business discourse."

Chrestensen v. Valentine, supra, at 525.

The subsection (j) exemption for obviously non-commercial "newspapers and newsperiodicals" is a classification which is not only reasonable but commanded by the Constitution itself.

"It may be that the majority was affected by an argument, advanced by Chrestensen, that because the ordinance permits the

free circularization of noncommercial handbills, which have no less a capacity to litter the streets, it is in violation of the 'equal protection' clause of the Constitution. But that clause does not prohibit a reasonable classification; and it is well established that, if there is a rational basis for a classification, the legislature may select for correction a particular one out of several similar evils. [Citation.] Apart from that, here the classification is one established by the Constitution itself. Once it is admitted that noncommercial handbills are constitutionally outside the scope of the so-called police power, it follows that legislation which operates only on that part of the field which is left, i.e., commercial handbills, is employing the very classification imposed by the Constitution itself." (Emphasis added.)

Ibid, at 525-526

The express language of Los Angeles Municipal Code §42.00(e) limits its application solely to commercial activity. An express exemption extending to noncommercial activity--which would be protected anyway--is clearly reasonable. Further, the express exemption [subsection (j)] manifests clear legislative intent that section (e), the charging section, is again strictly limited to unprotected commercial activity.

VII

PETITIONERS' RELIANCE ON YOUNG v. MUNICIPAL COURT (1971) 16 Cal.App. 3d 766, 94 Cal.Rptr. 331 AND THE WELTON DECISION IS MISPLACED

Respondent will forego any discussion of Welton, relied on so heavily by Petitioners, in deference to Respondent's petition to this Court for writ of certiorari which is now in preparation and should reach this Honorable Court shortly.

Young, however, is very important because of an influential dictum expressed therein (and quoted in the petition at 8:23-27) to the effect that municipalities

have no power to regulate sidewalks, but must limit their public safety regulation to "automobile traffic" alone. Because it was dictum (the statute in Young was clearly unconstitutional on its face by reason of the very commercial/noncommercial distinction discussed herein), the Young opinion received no attention from the California Supreme Court. That dictum, however, stands as an obstacle to every legitimate attempt by California municipalities to regulate their own public sidewalks.

The dictum is unfounded in theory, history, and practice. No authority is cited by the Young court for its support. Should this Court grant certiorari, Respondent would request the Court's attention be directed to this very important issue of modern municipal law.

Petitioners' reliance on McKay Jewelers, Inc. v. Bowron (1942) 19 Cal.2d 595, 122 P.2d 543 is also misplaced.

> "[McKay, supra] went out of its way to drag in a 'free speech argument.'" (Emphasis original.)

Resnik, supra, at 657;
cf. Ibid. at 658 for a complete
critique of McKay.

CONCLUSION

In construing Los Angeles Municipal Code §42.00(e) as properly restricted to nonprotected commercial activity and finding Petitioners' activities a violation thereof, the lower appellate court acted correctly.

Respectfully submitted,

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